BEFORE THE INDIANA CIVIL RIGHTS COMMISSION
311 West Washington Street
Indianapolis, Indiana 46204

STATE OF INDIANA)
) SS
COUNTY OF MARION)

OLIVER E. WILSON
AUSTIN C. WATHEN, JR
ROBERT L. WILSON,
Complainant,

DOCKET NO. PAra79020148
PAra79030234
PAra79030308

vs.

JOHN R. CURL, AND AVCO SECURITY AGENCY,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Comes now R. Davy Eaglesfield, III, Hearing Officer for the Indiana Civil Rights Commission ("ICRC"), and enters his Recommended Findings of Fact, Conclusions of Law, and Order (Hereinafter "the recommended decision"), which recommended decision is in words and figures as follows:

(H.I.)

And comes not any party filing objections to said recommended decision within the ten (10) day period prescribed by IC 4-22-1-2 and 910 IAC 1-12-1(B).

And comes now ICRC, having considered the above and being duly advised in the premises and adopts as its Final Order the Findings of Fact, Conclusions of Law, and Order recommended by the Hearing Officer, a copy of which is attached hereto and incorporated by reference herein.

Dated: May 29, 1981

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RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Indiana Civil Rights Commission ("ICRC"), pursuant to IC 22-9-1-6(j) (2), deemed it necessary to appoint a Hearing Officer in these cases, and the undersigned was duly appointed by the Chairman, Mr. James A. Lang.

A Pre-Hearing Conference was scheduled for January 3, 19080, and continued on motion by Complainants, rescheduled for March 4, 1980. Respondents John R. Curl ("Curl") and AVCO Security Agency ("AVCO") were served by publication with notice of the Pre-Hearing Conference but failed to appear and were defaulted on motion by Complainants. The Hearing which had been scheduled for March 10, 1980 was cancelled and a hearing on damages was ultimately scheduled and held on March 31, 1981.

Complainant Austin C. Wathen, Jr. ("Wathen") was present and testified and was represented by counsel, Mr. Robert D. Lange and Ms. M.E. Tuke. Complainants Robert L. Wilson ("R. Wilson"), ad Oliver E. Wilson ("O. Wilson") was not present, but was represented by counsel, Mr. Lange and Ms Tuke. R. Wilson's testimony at the hearing involving Stoplite, Inc., held December 13, 1979 was read into the record.

Neither Curl nor AVCO appeared, personally, by counsel, or otherwise.

Having considered the above, and being duly advised in the premises, I hereby the recommend the entry of the following Findings of fact, Conclusions of Law, and Order, which incorporate specific Findings of Fact and Conclusions of Law pertaining to the issue of liability which was resolved by the order of March 10, 1980, grant Complainants' Motion For Order by Default.

A Memorandum explaining the reasoning involved in certain aspects of this decision is attached hereto.

FINDINGS OF FACT

1. O. Wilson, Wathen, and R. Wilson are all Negro ("black") citizens of the State of Indiana.

2. Wathen is, and was at the time of the events which were the subject of this complaint, a career military officer in the Military Department of the State of Indiana stationed at Stout Field in Indianapolis, where he is and was an Equal Opportunity Specialist dealing with complaints of discrimination pertaining to the Indiana National Guard.

3. Curl is an individual who prior to Christmas of 1978 was a security guard at the Stoplite Disco ("the Stoplite"), and entity operated by Stoplight, Inc. The Stoplite, located on the Westside of Indianapolis, Indiana, was, at that time, an establishment offering its goods or services or facilities to the general public.

4. Curl was associated with a security agency known by the name of AVCO Security Agency and his duties including assisting in the exclusion of persons who were refused admission to the Stoplite.

5. On December 24, 1978, during the early morning hours, O. Wilson and R. Wilson, who are brothers, were refused admission to the Stoplite.

6. Curl advised the Wilsons that the reason they would not be admitted as that he had been instructed by management not to admit blacks into the club.

7. Both O. Wilson and R. Wilson would have been admitted in tot eh Stoplite on December 24, 1978 had they been Caucasian ("White").

8. There is no evidence that either O. Wilson or R. Wilson suffered any additional expense as a result of being excluded from the Stoplite on December 24, 1978.

9. I do not find the testimony of R. Wilson taken at the December 13, 1979 hearing of certain complaints against Stoplight, Inc. pertaining to the humiliation, embarrassment, and anger felt by him and his brother upon their exclusion of sufficient weight upon which to base an award of damages.

10. Wathen went to the Stoplite either shortly before midnight on Friday, December 23, 1978 or shortly after midnight on Friday, December 23, 1978.

11. Wathen was not admitted the first time he went to the Stoplite that weekend. At that time, he was advised by Curl that blacks were not allowed because a bomb threat had been received.

12. Wathen and Curl discussed the exclusion for three (3) to five (5) minutes. During the discussion other persons, unknown to Wathen, were present.

13. Wathen was upset at being excluded.

14. In addition to being upset, Wathen felt he was degraded and his reputation injured by the presumption, based solely on his race, that he was the type of person to plant a bomb.

15. On the afternoon of Saturday, December 23, 1978, Wathen telephoned a friend of his, Ms. Sandy Hanson, and related the events of the previous night at the Stoplite.

16. Later that day, Wathen again spoke to Ms. Hanson, who reported that she had called the Stoplite and been advised that thy had had some problems but they were cleared up now and that Wathen should be able to be admitted that night.

17. That night, December 23, 1978, Wathen, Ms. Hanson, and a friend of hers went to the Stoplite about 10:30 pm.

18. Again that night, Curl refused to allow Wathen to enter, stating that no blacks were allowed.

19. The second exclusion caused Wathen to feel angry and embarrassed him in the presence of his friends.

20. Wathen spent twenty-five dollars ($25.00) for gasoline to get to the Stoplite and back home twice which he would not have otherwise spent.

21. Wathen would have been admitted to the Stoplite on both occasions had he been white.

22. Neither Curl nor AVCO has been prosecuted for the participation in the exclusion of blacks from the Stoplite during the weekend immediately preceding Christmas of 1978.

23. The acts of Respondents in participating in the exclusion of blacks, because of race, from the Stoplite, on the weekend immediately preceding Christmas of 1978, were outrageous and blatant violation of long standing civil rights laws and were committed with no apparent regard for the consequences therefore.

24. Any Conclusion of Law which should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. ICRC has jurisdiction over the subject matter and the parties.

2. Curl is an individual is, therefore, a "person" IC 22-9-1-3(a).

3. AVCO is at least one of the following: "…one or more individuals, partnerships, association, organization, … and other organized groups of persons." *Id.,* and is therefore a person.

4. O. Wilson Wathen, and R. Wilson were excluded from equal opportunity for access to the Stoplite because of their race. Curl and AVCO, through Curl, participated in this exclusion and therefore committed a "discriminatory practice" because that term is defined as follows:

> The term "discriminatory practice" means the exclusion of a person, from equal opportunities because of race…IC 22-9-1-3(1).

5. Whether Curl and/or AVCO are "public accommodations" as that term is defined in IC 22-9-1-3(1) is not material, as the Stoplite (or Stoplight, Inc.) clearly was and

> [e]very discriminatory practice *relating to* … public accommodations…shall be considered unlawful unless it is specifically exempted by this chapter. IC 22-9-1-3(1). (emphasis added).

6. The following are "losses" which ICRC is empowered to "restore" pursuant to IC 22-9-1-6(k) (1) upon the finding that a person has engaged in an unlawful discriminatory practice:

a. Additional travel expenses; and

b. Loss of peace of mind or mental sanguinity as demonstrated by being upset, having one's reputation or character injured in the presence of others, anger, and embarrassment.

7. The act of denying a person full and equal use of services, facilities, or goods to the general public because of race is a Class B misdemeanor. IC 35-46-2-1(1). Since the Statute of Limitations for misdemeanors is two (2) years, IC 35-41-4-2(a)(2), prosecution is now barred.

8. ICRC is also empowered [by §6(k)*II)] has been found to have engaged in an unlawful discriminatory practice to "…take further affirmative action as will effectuate the purposes of this chapter…"*Id.* In the Wathen case where Respondents have engaged in outrageous conduct with apparent disregard of the consequences, which conduct cannot be the subject of criminal prosecution, said "further affirmative action" may include punitive damages.

9. Two hundred fifty dollars ($250.00) is an appropriate amount to award for the losses of peace of mind which Respondent acts caused to Wathen.

10. Two hundred fifty dollars ($250.00) is an appropriate amount to award in punitive damages.

11. Respondents should, and can, be ordered to cease and desist fro the unlawful discriminatory practice.

12. Since compensatory damages are a prerequisite for any award of punitive damages, *Newton v. Yates* ____Ind. App. ____, 353 N.E.2d 485 (1976), and since no compensatory damages can be awarded to either O. Wilson or R. Wilson, no punitive damages can be awarded to them.

13. Any Finding of Fact which should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Respondents shall cease and desist from participation in any denial of equal opportunities because of race relating to access to or use of public accommodations.

2. Respondents are jointly and severally liable to Austin C. Wathen, Jr., for the payment of five hundred twenty five dollars ($525.00). A certified check or money order in that amount shall be made payable to Austin C. Wathen, Jr. and delivered to ICRC no later than twenty-five (25) days after the date a majority of the members of ICRC enter their final order, unless ICRC modifies the order, or ICRC's Order is stayed by a court of competent jurisdiction.

Dated: April 16, 1981

MEMORANDUM

In the ***Spotlight*** case, I ruled that IC 22-9-1-6(k) (1) did not authorize the Indiana Civil Rights Commission ("ICRC") to award monetary damages for the losses evidenced by certain mental and/or emotional responses to an unlawful discriminatory practice characterized by the general phrase "mental anguish". Because this decision, as to one of the Complainants, recommends damages for certain kinds of mental anguish, it is obvious that I have reconsidered that ruling and changed my opinion on that issue. The reasons for that change deserve an explanation.

Furthermore, this case recommends the award of punitive damages to one Complainant. By definition, the same are awardable only for extreme misconduct. In order to insure that the scope of my recommendation on this issue is not misconstrued, an explanation of this recommendation is also in order.

The relevant statutory provision, in material part, is as follows:

> The commission shall have the following powers and duties:(k)(1)…if the commission finds a person has engaged in an unlawful discriminatory practice, it may cause to be served on such person an order requiring such person to cease and desist from the unlawful discriminatory practice and requiring such person to take further affirmative action as will effectuate the purpose of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice… IC 22-9-1-6(k) (1). (emphasis added).

1. **Mental Anguish**

The sorts of harm that were found in this case were: being upset and degraded, injury to reputation, anger, and embarrassment, which each constitute mental disturbance, distress, suffering, or anguish, all of which are used more or less interchangeably by courts dealing with this issue. See *Charlie Stuart Oldsmobile, Inc., v. Smith* ____Ind. App ____, ____, 357 N.E. 2f 247, 252 (1976) at n.5.

Indiana has long followed the general rule that damages for mental distress are recoverable only when accompanied by and resulting from a physical injury. *Charlie Stuart, supra.* and cases cited therein.

In explaining the basis for this rule, the *Charlie Stuart* Court stated that

> [T]he reasons courts are reluctant to award such damages are readily apparent. The very nature of the claim is subjective and may easily be feigned. Courts naturally fear a flood of fictitious claims carrying with it potential for imposing unlimited liability. *Charlie Stuart, supra.* at 257 n.e.2d 253.

In the *Charlie Stuart* case, the Court mentioned an exception to the general rule which Indiana Courts have recognized. The Court's discussion with respect to the exception states:

> Indiana courts have awarded compensatory damages for mental anguish unaccompanied by a physical injury in certain tort actions involving the invasion of a legal right, which by its very nature is likely to provoke, and emotional disturbance. False imprisonment and assault actions are examples of instances in which a disagreeable emotional experience would normally be expected to be inextricably intertwined with the nature of the deliberate wrong committed, thereby lending credence to a claim for mental disturbance. The conduct of the defendant in such circumstances is characterized as being willful, callous, or malicious, which may produce a variety of reactions, such as fright, shock humiliation insult, vexation inconvenience, worry, or apprehension (citations omitted)…
>
> The Indiana cases are consistent with most other jurisdictions which allow recovery for mental anguish as an element of compensatory damages in an action for injury to personal property only if the act occasioning the injury was inspired by fraud, malice, or like motives involving intentional conduct. (Citations omitted). *Charlie Stuart, supra* at 357 N.E. 2d 254.

The *Wathen* case has every attribute of the exception. The right to access to public accommodations without regard to race is an "example of an instance where [a] disagreeable emotional experience would normally be expected to be inextricably

intertwined with the nature of the deliberate wrong committed," the "conduct of respondents was [at the very least] callous," the motive for the act, racial animus or prejudice, is either malice or [a] like motive."

Thus, under the principles set out by the Court of Appeals in the *Charlie Stuart* case, Wathen should be entitled to damages for mental distress.

In *Indiana Civil Rights Commission v. Holman*____Ind. App. ____, 380 N.E.2d 1281 (1978), in reference to ICRC's power to restore Complainant's losses under IC 22-9-1-6(k)(1), the Court of Appeals stated that

> [W]e hold that the losses referred to in this statute are pecuniary losses which can be proved with some degree of certainty, such as where a person has been denied employment, or living accommodations, or business in violation of the Civil Rights Act (sic) where that violation results in actual pecuniary loss. *Holman, supra.* at 380 N.E.2d 1285.

It was the *Holman* case that caused me to conclude in the *Stoplight* cases that Complainants could not, as a matter of law, recover damages for mental distress. Upon reflection and reconsideration, I must now conclude, with all due respect to the Court of Appeals, that the portion of its opinion quoted above is erroneous.

Indeed, I have considerable sympathy for the plight of the Court of Appeals faced in resolving this question in the *Holman* case as the record and decision of ICRC clearly would not support that portion of its decision awarding one thousand dollars as "damages attributable to racial insult" for any number of reasons other than whether ICRC had the statutory authority to award damages for mental distress suffered as a result of a violation of the Indiana Civil Rights Law under any circumstances. Appellant Holman however presented only that question.

Holman was a case where a lease was not renewed and ICRC found the non-renewal to have been because of race, entered a Conclusion of Law to the effect that "Complainants have suffered compensable racial insult as a result of the actions of Respondent, and an Order that "[t]he complainants Mr. & Mrs. Johnny Jackson should have judgment (sic) against the Respondent Halvie R. Holman for damages attributable to racial insult in the amount of $1,000.00".

Though the Court of Appeals stated that Complainants had interpreted a reference to them as "that kind of people" to be a racial slur, *Holman, supra.*, ICRC had not so found, nor had it made any other finding that the Jacksons had, in fact, suffered any form of mental distress. Moreover, the reasonableness of that interpretation of a reference to "that kind of people" is subject to some question.

Furthermore, ICRC had not explained what is meant by the phrase "compensable racial insult." It is a fair reading of ICRC's decision in *Holman* that racial insult is present whenever unlawful racial discrimination has occurred and that the Jacksons should received a thousand dollars in that case as a result. It is impossible to determine whether ICRC meant "racial insult" as an insult to an entire race or an insult to Complainant on the basis of his or her race.

The direct and logical attack on the ICRC's decision was that whatever racial insult is, in the absence of any Findings of fact that was suffered by Complainant, it cannot possibly be one of what IC IC 22-9-1-6(k) (1) refers to as "complainant's losses." Possibly because this would result only in a remand to make findings capable of intelligent judicial review, see *Department of Financial Institutions v. State Bank of Lizton* 253 Ind. 172, 252, N.E.2d 248 (1969), Holman did not launch this attack.

In sum, the Court of Appeals was presented with a novel concept – compensable racial insult – with no Findings of Fact even hinting at what the concept entailed. Moreover, because of the positions taken by the parties, the Court was forced to address whether the statute authorized ICRC to award damages where no out of pocket loss had occurred. The obvious just result in *Holman* was that the $1,000.00 award not be upheld. In my view, the Court answered the question presented negatively in order to reach the just result, perhaps unconsciously. (Obviously, I have no personal knowledge of the Court's thinking process but have inferred it from the evidence available to me). For these reasons I believe that faced with <u>this</u> case, the Court would uphold an award of damages for mental distress.

Before concluding this portion of the Memorandum, I wish to point out the limited scope of this decision. This decision arises out of an egregious, clear set of circumstances where Respondents participated in a plan to exclude all blacks from a discotheque on no other basis than that they were black and reasons for the exclusion

was expressly communicated to those potential patrons. There was no reasonable room for doubt on anyone's part that the exclusion was unlawful racial discrimination. Though I believe that there may be cases where a violation is not sufficiently obvious to allow the inference that it inevitably provoked an emotional response this case is obviously not among that group.

Furthermore, because there is no exact measure of the severity of emotional responses, designation of amount to be awarded must be preformed with caution. Uncertainty as to amount is no bar to awarding damages, howeve3r, *Ind. R.R. Co. v. Orr* 41 Ind. App. 426, 84 N.E.32 (1908), and ICRC neither can, nor should, evade its statutory duty because of its difficulty. I have, however, endeavored to comply with the requirement on ICRC's neighbor to the south that such awards be supported by detailed written findings on the nature and degree of injury suffered, see *Kentucky Commission on Human Rights v. Barbour* 587 5. W.2d 849 (Ky. App. 1979). Such detailed findings will not only enable intelligent and meaningful judicial review, but also will gradually result in the setting of standards on amounts to be awarded.

2. **Punitive Damages**

ICRC is empowered by IC 22-9-1-6(k) (1) to enter an order requiring a person found to have committed an unlawful discriminatory practice"…to take further affirmative action as will effectuate the purposes of this chapter."

One of those purposes is

> …to eliminate segregation or separation based solely on race…since such segregation is an impediment to equal opportunity:...IC22-9-1-2(a)

"Elimination" is obviously a preventative purpose and punitive damages are designed to deter, rather than compensate. *Huff v. White Motor Corp*. 609 F.2d 286 (7th Cir. 1979), *Cox v. Guy S. Atkinson Co.* 468 F.Wupp. 677 (N.D. Ind. 1979). Therefore, paying punitive damages is an affirmative act that will effectuate the purposes of this chapter.

The general rule in Indiana is that punitive damages may not be recovered where there is a possibility that the wrongful act might gibe rise to a criminal prosecution *Moore v. Waitt* 157 Ind. App. 1, 298 N.E.2d 456 (1973), *Cohen v Peoples* 140 Ind. App. 353, 110 N.E.2d 665 (1966).

As with the issue of damages for mental anguish, this case fits an exception to the general rule, that being that where the applicable statute of limitations has expired. *Glassman v. Rutt* ____Ind. App.____372 N.E. 2d 1188 (1978) *Nicolson's Mobile Home Sales, Inc. v. Schramm* 164 Ind. App. 518, 330 N.E,. 2d 785 (1975), *Cohen, supra.* Obviously where the statute of limitations has expired, no criminal prosecution is possible.

Because Respondents' acts were a blatant violation of Wathen's civil rights committed with a heedless disregard of their consequences, it is my belief that punitive damages are appropriate in this case.

Dated: April 16, 1981